

The 2nd Scottish Government consultation on the Environmental Liability Directive

Background

The Scottish Government's 2nd consultation on the Environmental Liability Directive (ELD) was published on 16 May 2008. The deadline for responses is 8 August 2008. Final transposition is intended to take place in December 2008.

In the Scottish Government's first consultation on the ELD 54 general responses were received from public authorities, NGOs, industry and individuals. In addition there were also 194 individual responses in relation to issues surrounding GMOs.

The 2nd consultation seeks comments on the draft Environmental Liability (Prevention and Remediation)(Scotland) Regulations 2008 (the draft Regulations) , the draft guidance, a quick guide on the Regulations and the draft Regulatory Impact Assessment. It consists of only 6 very general questions and one additional general question/comment:

Q.1 Do you think that the draft Regulations adequately reflect the Directive?

Q.2 Do you think that the Quick Guidance will be helpful to operators? You may wish to comment here on the process as set out under 'roles and responsibilities' as set out in the quick guide?

Q.3 Is there anything you would like included in the Quick Guidance that is not there already?

Q.4 Do you think the relationship with existing legislation is correct? If not how should this relationship be protected?

Q5. Do you think the Technical Guidance provides sufficient understanding of the requirements and how the Regulations should be exercised in practice?

Q6. Is there any information you have which should be included in the RIA?

Any other issues/comment

We will be happy to receive any other comments relating to any part of this consultation but **it would be helpful** if these could be set out as briefly and simply as possible. This will allow us to analyse and consider any comments submitted on the consultation documents more easily and quickly.

Key issues:

Issue	Negative	Positive
Inclusion of SSSIs and other nationally designated wildlife, e.g. UK BAP habitats and species	Unlike in England, Wales and probably NI, Scotland is not planning to introduce SSSIs or any other nationally protected wildlife.	N/A
Permit and state of the art defences	<ol style="list-style-type: none"> 1. The discretion given to Member States to introduce the permit and state of the art defences is to be exercised and the defences are to be included in the Scottish Regulations (but see neighbouring column). 2. De facto new permit defence introduced in Schedule 1, para 1(3): no liability for acts expressly authorised under the Habitats Regulations 1994 or the Wildlife and Countryside Act 1989. 	<ol style="list-style-type: none"> 1. Permit and state of the art defences are treated as factors to be taken into account in mitigation, and only enable an exemption from costs of remediation, not from liability (the same goes for the 3rd party and compulsory order defences). This is in line with the ELD (unlike system in England which is in breach of the ELD). 2. No permit and state of the art defences to apply in relation to GMOS.
Extension of strict liability to all types of damage caused by any activity (not just Schedule 2 activities)	1. The dual system of strict liability for any damage caused by Schedule 2 activities, and fault-based liability for wildlife damage caused by other activities has been kept. No extension of strict liability.	N/A
Access to justice for NGOs and interested parties in cases of imminent threat	N/A	<p>The discretion given to Member States to remove this right is not to be exercised.</p> <p>The additional restrictions introduced in the English and Welsh draft Regulations have not been followed.</p>
Limitation of liability	<ol style="list-style-type: none"> 1. Long-stop limitation period: 30 years 2. Liability under Regulations only once the Regulations are in force, even though ELD applies as of 30/04/07. This is a breach of EU law. 	<ol style="list-style-type: none"> 1. Extension of long-stop limitation period to 75 years in relation to GMOs. 2. Discretion re use of different types of liability, e.g. proportional or joint and several.
Definition of water damage	1. Potential exclusion of small but environmentally	General link to Water Framework Directive (WFD)

Issue	Negative	Positive
	<p>significant water bodies (arguably breach of ELD).</p> <ol style="list-style-type: none"> 2. Potential exclusion of hydro-morphological water damage (in breach of EU law) 3. Definition linked to change in WFD water status category: does not include significant damage within boundaries of one category. 	<p>wording.</p>
Threshold for wildlife damage	N/A	<p>It would appear that the threshold for biodiversity damage is to be set at the appropriate level, be it Scottish, UK or any other level.</p>
Appeals	<p>Appeal suspends remedial measures (but see neighbouring column)</p>	<ol style="list-style-type: none"> 1. Short appeal period (21days) 2. Remediation not suspended during appeal if imminent threat of damage.
Relationship with CFP	Not mentioned, so open to interpretation.	Not mentioned, so open to interpretation.